STATE OF MICHIGAN

IN THE SUPREME COURT

In the Matter of the Complaint of the **CARRIER CREEK DRAIN DRAINAGE DISTRICT** for Condemnation of Private Property for Drainage Purposes in Eaton County, Michigan.

/

CARRIER CREEK DRAIN DRAINAGE DISTRICT,
Plaintiff–Appellee,
v
LAND ONE, L.L.C.,
Defendant–Appellant.

Supreme Court
No. 130125

Court of Appeals
No. 255609

Eaton County Circuit Court
No. 03-67-CC

/

CARRIER CREEK DRAIN DRAINAGE DISTRICT,
Plaintiff–Appellee,
v
ECHO 45, L.L.C.,
Defendant–Appellant.

Supreme Court
No. 130126

Court of Appeals
No. 255610

Eaton County Circuit Court
No. 03-68-CC

/

CARRIER CREEK DRAIN DRAINAGE DISTRICT,
Plaintiff–Appellee,
v
LAND ONE, L.L.C.,
Defendant–Appellant,
and
STANDARD FEDERAL BANK,
Defendant.

Supreme Court
No. 130127

Court of Appeals
No. 255611

Eaton County Circuit Court
No. 03-69-CC

/

130125-6-7
reply

APPELLANTS' REPLY BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

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APPELLANTS' REPLY BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

The Defendants–Appellants shall continue to rely upon their discussion of the pertinent facts presented in their Application. It is necessary, however, to respond to certain representations of "fact" and inappropriate content included in Plaintiff's response.

On page 10 of Plaintiff's responsive brief, Plaintiff's counsel has noted that Defendants' original trial counsel has been sued for malpractice for his mishandling of these matters, and has submitted a copy of the Complaint in that action as Appendix 3. This, of course, was highly inappropriate because, as every attorney who practices before this Court knows, appellate review is strictly limited to the record developed in the trial court, and thus, a party may not expand the record on appeal by reference to facts not presented at the trial court level. Sherman v Sea Ray Boats, Inc., 251 Mich App 41; 649 NW2d 783 (2002); Kent County Aeronautics Board v Department of State Police, 239 Mich App 563; 609 NW2d 593 (2000), *aff'd* 463 Mich 652 (2001) The malpractice complaint attached to Plaintiff's responsive Brief as Appendix 3 was never made a part of the trial court record in these cases, nor has Plaintiff's counsel ever sought leave to expand the record on appeal.[1] Thus, at a minimum, the Court should disregard the inappropriately submitted appendix and all references to the malpractice action against Defendants' former counsel.

On page 6, Plaintiff's counsel has stated that Defendant Land One's claim of damage to the remainder relating to the 4.8 acre area within the commercially-zoned parcel was not disclosed in any of Defendants' appraisal reports, deposition testimony or discovery

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[1] The same improper attempt to expand the record was made in the Appellee's Brief filed in the Court of Appeals. It is repeated here, despite the objection previously raised by Defendants in their Court of Appeals Reply Brief.

responses, but was, instead, "presented for the very first time at trial."[2] Although it may be acknowledged that Defendants' appraiser gave testimony concerning damage to the remainder with regard to the 3.16 acre area in the industrially-zoned parcel at issue in Case No. 03-67-CC which was not addressed in either of his appraisal reports,[3] this claim is simply untrue with regard to the 4.8 acre area in the commercially-zoned parcel involved in Case No. 03-69-CC.[4] The transcript cites provided in support of this claim do not support it, as it is plain that the testimony appearing on the cited pages refers only to the industrially-zoned parcel. Furthermore, Mr. Essa's original appraisal report, dated June 30, 2003, did address the issue of damage to the remainder with regard to the landlocked area within the commercially-zoned parcel, although he underestimated the size of that area to be 4.35 acres. The Court should note, in this regard, that Mr. Essa's original appraisal report for the commercially-zoned parcel was admitted at trial as Plaintiff's Exhibit 8 in Case No. 03-69-CC. (T. Vol. II, pp. 60-62)[5] The trial testimony regarding the commercially-zoned parcel reveals that this element of damage to the remainder was also discussed in Mr. Essa's deposition. (T. Vol. IV, pp. 151-152)

Additional discussion of the pertinent facts will be included in the body of the Legal Argument, *infra*, to the extent that such discussion may be required to fully inform the Court .

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[2] This claim is repeated on page 18 in Plaintiff's discussion of Issue II.

[3] Mr. Essa prepared amended appraisal reports eliminating discussion of damage to the remainder pursuant to the trial court's original ruling excluding all evidence of damage to the remainder.

[4] This misrepresentation has also been repeated, despite the correction made in Defendants' Court of Appeals Reply Brief.

[5] The pertinent portions of that exhibit, addressing Defendant Land One's claim of damage to the remainder for this area, are attached as Appendix "A."

LEGAL ARGUMENT

I. MCL 213.55(3) DOES NOT REQUIRE NOTICE THAT A LANDOWNER WILL SEEK JUST COMPENSATION FOR A TAKING OF PROPERTY BASED UPON A HIGHER AND BETTER USE IN ACCORDANCE WITH A POTENTIAL REZONING OF THE PROPERTY.

On page 8 of its response, Plaintiff has asked the Court to take judicial notice that Defendants' former counsel has been sued for malpractice, and proposes that the Court should consider Defendants' Complaint in that action as a party admission that Defendant Echo 45, LLC's claim regarding evidence of potential rezoning was not preserved for presentation at trial. This suggestion is inappropriate for two reasons. First, as noted previously, this claim has been based entirely upon documentary evidence which has not been made a part of the record on appeal, and thus, this improper argument should be disregarded. Although the Court may take judicial notice of indisputable matters in appropriate cases, its decision-making process must still be limited to consideration of documents properly made a part of the record. The malpractice complaint was not made a part of the record in the trial court,[6] and Plaintiff's counsel has never sought leave to make it an additional part of the record on appeal in this case.

Second, this argument is contrary to the well-established principle that alternative claims in pleadings should not be deemed binding as party admissions. As the Court of Appeals recently noted, in the case of Shuler v Michigan Physicians Mutual Insurance Co., 260 Mich App 492; 679 NW2d 106 (2004), "a party should not be placed in a position of

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[6] The Court should note, in this regard, that the malpractice complaint was filed in a different judicial circuit (Ingham County), and thus, cannot be characterized as a record of the trial court.

having to forego a claim at the risk of having inconsistent allegations treated as admissions." 260 Mich App at 514, quoting Larion v Detroit, 149 Mich App 402, 407; 386 NW2d 199 (1986).

Although this case does not involve inconsistent allegations made within a pleading, the same principle applies with equal force here. The trial court has held, in this case, that Defendant Echo 45, LLC's claim regarding potential rezoning was not preserved for presentation at trial, and the Court of Appeals has agreed with that holding. Although Defendants disagree with that conclusion, the lower court rulings on this question have provided a proper basis for their malpractice claim, and will continue to do so unless reversed by this Court. Obviously, Echo 45, LLC would prefer a complete and proper adjudication of its claim for just compensation in this case over a cause of action for legal malpractice which, despite its potential merit, lacks the liquidity and certitude of condemnation damages. Under the circumstances presented here, it has been not inconsistent for Echo 45, LLC to claim legal malpractice based upon the trial court's ruling, while suggesting that this ruling should be reversed.

Plaintiff's response continues to confuse the elements of just compensation, maintaining that an increase in value attributable to a reasonable possibility of rezoning is "a damage component, or an element of "just compensation" the same as the business interruption damages claimed in *Woodson, supra*." (Plaintiff's response, p. 13) It may be acknowledged that an increase in value attributable to a reasonable possibility of rezoning is an "element of just compensation,"[7] but that is not what the statute addresses; subsection

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[7] As Defendants have noted previously, an increase in value attributable to a reasonable possibility of rezoning is, clearly, an "element of just compensation" because it is one of the elements defining the value of the property taken.

55(3) does not require notice of any overlooked or inadequately included "element of just compensation." The statute is more specific in referring to an "item of **compensable property or damage.**" (Emphasis added) Presumably, if the Legislature had intended for subsection 55(3) to apply more broadly to any overlooked or inadequately included "element of just compensation," it would have employed language properly signifying that intent. It did not choose to do so, and thus, the statute must be more narrowly construed in accordance with the language that the Legislature did use.

Plaintiff has not disputed that the good faith offer did not overlook, or fail to fully include, any "item of compensable property." Plaintiff has instead insisted that Defendant Echo 45's claim for increased value attributable to a reasonable possibility of rezoning is an element of "damage," but has cited no authority other than the Court of Appeals' decision in this case for that assertion. Plaintiff has confused "damages" and "just compensation." Its argument overlooks the reality that the broad concept of just compensation includes both payment of the value of the property taken – the condemning authority is, in effect, purchasing that property from the landowner over its objection – and payment of damages, such as damage to the remainder or business interruption damages, that flow from the taking.

On page 14 of its response, Plaintiff correctly notes that the Court of Appeals looked to the "plain and ordinary meaning of 'compensable damage' as being "loss, harm, or injury which is eligible for compensation." " Applying that definition, the Court of Appeals erroneously concluded that Echo 45's claim for compensation based upon a reasonable possibility of rezoning as an element of just compensation was a claim for "compensable damage" which had to be disclosed in accordance with MCL 213.55(3). The logic supporting this conclusion is flawed for two reasons. First, the Court's reliance upon the aforementioned

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definition of "compensable damage" might have been appropriate in any other case involving a dispute over the meaning of that term (the meaning of the term in a personal injury action, for example), but it is not appropriate here, where in keeping with the all-inclusive nature of "just compensation," the statute refers to more than just "compensable damage." Here, the statute at issue refers to "items of compensable property **or** damage." It is reasonable to assume that the Legislature would not have used these separate terms – "compensable property **or** damage" – if it had intended for "compensable damage" to cover all of the elements of just compensation.

Second, the construction proposed by the Plaintiff and adopted by the Court of Appeals in this matter would render the statute's reference to "compensable property" entirely superfluous. This would plainly run afoul of the well established rule of statutory construction that, in construing a statute, the courts must make every effort to give meaning to every part of it and avoid rendering any part nugatory. State Bar of Michigan v Galloway, 422 Mich 188; 369 NW2d 839 (1985). Seeming inconsistencies in various provisions of a statute should be reconciled so as to arrive at a meaning which gives effect to all parts of the statute. Petition of Michigan State Highway Commission v Canton Township, Wayne County, 383 Mich 709; 178 NW2d 923 (1970). In accordance with these time-honored principles, the Court should ask: If the value of the property taken is considered an element of "damage," why was the statute written to refer to "items of compensable property or damage?" If the value of the property taken was considered an element of "damage," there would have been no need to specify anything more.

On page 14 of its response, Plaintiff blithely dismisses Defendants' argument that Plaintiff's proposed interpretation of 55(3) would improperly require landowners to have the

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knowledge and skill of appraisers. Plaintiff states that "the law regarding the possibility of rezoning claims *require* a landowner to be aware of the possibility. A possibility of rezoning is not an esoteric analysis of land use in a written appraisal report, but rather a true, actual potential for rezoning based on events that the landowner has already set in motion." (Plaintiff's response, p. 14) There is no authority cited for this, and the logic is flawed. It is not at all unreasonable to assume that an appraiser, whose profession requires a detailed knowledge of factors affecting property values, may be aware of possibilities for rezoning that an individual land owner would not be aware of. Thus, Plaintiff's argument underscores the weakness of its position.

Plaintiff has not addressed the legislative history of subsection 55(3), beyond its unwarranted characterization of Defendants' arguments as an "attempt to fabricate legislative intent." (Plaintiff's response, p. 14) Most notably, Plaintiff has offered no comment upon the parallel provisions governing disclosure of appraisal reports added by the same amendatory act that created subsection 55(3). As Defendants have noted previously, timely disclosure of appraisals and the basis for the opinions expressed therein is promoted by MCL 213.61, which requires, upon motion of either party, that the court issue a scheduling order to assure that appraisal reports are exchanged, and that the parties are afforded a reasonable opportunity for discovery before a case is submitted to mediation, alternative dispute resolution or trial. An appraisal report provided pursuant to such an order must "fairly and reasonably describe the methodology and basis for the amount of the appraisal." Failure to comply with these requirements may bar the testimony of an offending party's appraisal expert. These provisions were plainly intended to facilitate timely disclosure of information, including factual basis and valuation methodologies, pertaining to valuation of the property taken. It is inconceivable

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that the separate, and inconsistent, requirements of subsection 55(3) were intended to cover the same subject matter when both provisions were created by the same amendatory act.

Finally, on pages 15-17, Plaintiff has suggested that Defendants' evidence was properly excluded because Defendants have failed to show a reasonable possibility of rezoning. This suggestion is without merit for two reasons. First, as Defendants have noted previously, it is not necessary for the landowner to show an accomplished rezoning, or even a probability that rezoning will occur; if there is a reasonable possibility that the zoning classification will be changed, that possibility should be considered in arriving at the proper value. State Highway Commissioner v Eilender, 362 Mich 697, 699; 108 NW2d 755 (1961); M Civ JI 90.10.

Although it may be acknowledged that no proceedings had been initiated to effect a rezoning of the Echo 45, LLC property, Mr. Essa testified that, in his opinion, the highest and best use of that property would be professional office building use. Based upon his investigation, Mr. Essa felt that there was market demand for property to be used for professional office use, and believed that there was a possibility of utilizing the Echo 45, LLC property for that purpose. Based upon his knowledge of the real estate market in Delta Township, it was his opinion that this property should be valued at $125,000 per acre when valued in accordance with its highest and best use as professional office property. (T. Vol. IV, p. 125-127)[8] Plaintiff has not refuted this expert opinion by any evidence that the contemplated rezoning could not be accomplished. Thus, the reasonable possibility of

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[8] Mr. Eyde also felt that the Echo 45, LLC property could be used for a higher and better use than use for residential purposes. (T. Vol. V. pp. 67-68) He testified that, in his opinion, this property would have been suitable for development as an office park by virtue of its favorable physical features, including its accessibility from Canal Road; its visibility from, and proximity to, the highway; and the availability of all necessary utilities. (T. Vol. V. pp. 65-70)

rezoning established by this evidence should have been deemed sufficient to permit consideration of the increase in value attributable to that potential.

Second, Plaintiff's arguments regarding the sufficiency of the proofs should be disregarded because neither of the lower courts have made any finding concerning the sufficiency of the factual proofs. The trial court held that it would not consider Echo 45's claim concerning the possibility of rezoning based upon its finding that this claim should have been disclosed pursuant to MCL 213.55(3). The Court of Appeals affirmed the trial court's decision based upon its interpretation of subsection 55(3) without commenting upon the sufficiency of Defendant's offer of proof. Thus, the issue ruled upon below and now presented here is purely a question of law; it does not turn upon the sufficiency of proofs that the trial court refused to consider based upon it legal ruling. Moreover, the Court should bear in mind that the importance of this issue extends far beyond the ultimate disposition of this case because the Court of Appeals has now granted publication of its decision at Plaintiff's request. Thus, the erroneous decision of the Court of Appeals will be binding as authority in future cases, and will improperly sanction exclusion of important evidence concerning the value of property taken in future condemnation cases, regardless of the factual sufficiency of the proofs presented, if this Court does not grant leave to appeal or other appropriate peremptory relief in this case.

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II. THE TRIAL COURT ERRED IN FINDING THAT THERE WAS NO DAMAGE TO THE REMAINING PROPERTY ON THE PARCELS OWNED BY DEFENDANT LAND ONE, LLC.

On page 18 of its response, Plaintiff again claims to have been surprised by Defendant Land One's claims of damage to the remainder regarding the 3.16 acre area and the 4.8 acre area. This claim is untrue with regard to the 4.8 acre area within the commercially-zoned parcel, as Defendants have previously explained.[9]

Plaintiff has also disputed Defendant's claim that these areas have become landlocked as a result of the takings, claiming that "these lands are not landlocked in the true sense." (Plaintiff's response, p. 17) This criticism rings hollow in light of Plaintiff's acknowledgement of Mr. Eyde's unrefuted testimony that a culvert would have sufficed to gain access to these properties before the taking, while a bridge would be required to do so afterward. It is obvious that Mr. Eyde has been damaged if he must now build bridges to gain access to these parcels when insertion of a culvert would have sufficed beforehand. In light of this circumstance, the trial court's finding that there was no damage to the remainder with regard to these areas was clearly erroneous, and should therefore be reversed. Plaintiff's claim that the trial court's judgment should not be disturbed because its ultimate valuation fell within the range of the testimony should be deemed unpersuasive here, where the trial court awarded nothing for this important element of damage.

[9] Plaintiff has also insinuated that Mr. Essa's finding of damage to the remainder concerning these properties was untrustworthy because he prepared two appraisal reports for each of the parcels owned by Defendant Land One, LLC. As noted previously, Mr. Essa's second report for each of these properties was prepared to eliminate the discussion of damage to the remainder pursuant to the trial court's original ruling excluding all evidence of damage to the remainder.

RELIEF

WHEREFORE, Defendants–Appellants Land One, L.L.C. and Echo 45, L.L.C. respectfully request that this Honorable Court grant their application for leave to appeal, or other appropriate peremptory relief.

Respectfully submitted,

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